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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 265

CLYDE-MALLORY LINES,
Petitioner (Libellant-Appellee),

against

STEAMSHIP EGLANTINE,
UNITED STATES OF AMERICA,
Respondent (Intervenor-Appellant).

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner, Clyde Mallory Lines, a Maine Corporation, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit rendered April 29, 1942 reversing a final decree in admiralty of the District Court for Eastern Louisiana filed April 29, 1941 (R. 71). That decree granted recovery to petitioner under its libel brought in rem against steamship *Eglantine* to recover for collision damage to libellant's steamer *Brazos*.

Jurisdiction

Jurisdiction is based on 240 (a) of the Judicial Code as amended, 28 U. S. Code §347.

The judgment below was entered April 29, 1942 (R. 85).

Summary Statement

A collision between petitioner's steamship *Brazos* and steamship *Eglantine* occurred on December 21, 1932. The *Eglantine* was owned by the United States and was operated as a merchant vessel (R. 29). Shortly thereafter petitioner filed in the District Court for Southern New York a petition for limitation of liability in which the United States appeared and made claim for its damages sustained in the collision. That proceeding resulted in a decision holding both vessels at fault. The United States appealed and the Circuit Court of Appeals for the Second Circuit affirmed. Thereafter petitioner and the United States stipulated the damages sustained by each, it being agreed that petitioner's damages (*Brazos*) exceeded the *Eglantine's* damages (R. 30-1). Meantime the *Eglantine* was sold by the United States to Lykes Bros.-Ripley Steamship Co. Inc. Thereafter, on June 10, 1937, petitioner filed its libel in the District Court for Eastern Louisiana setting forth the New York limitation proceedings and claiming one-half the difference between its damages and the *Eglantine's* damages arising out of the collision (R. 4-8). Process issued and the *Eglantine* was seized, but was released upon the suggestion of the United States attorney that the United States was a party at interest (R. 9-13).

After its intervention in petitioner's suit against the *Eglantine* the United States raised the defense that the suit was not brought within the two year Statute of Limitations contained in the Suits in Admiralty Act, Act of March 9, 1920, 41 Stat. 526, 46 U. S. Code §745 (R. 14-22). The case was tried upon stipulated facts (R. 29-31).

The Decisions Below

The District Court held (R. 65-70) that a lien accrued in favor of petitioner against the *Eglantine* in rem when the collision occurred and that this suit, being one against the privately owned *Eglantine in rem* and not a suit against the United States, is not controlled by the two-year limitation of the Suits in Admiralty Act. It entered a decree in favor of petitioner for half the difference between petitioner's damages and respondent's damages, viz., $3,829.61, with interest.

The Circuit Court of Appeals ignored petitioner's collision lien, brushed aside the fact that this is not a suit against the United States but one against the privately owned *Eglantine in rem*, held that the cause of action was created by virtue of the Suits in Admiralty Act and applied the two-year limitation of that act (R. 80-4). Accordingly, it reversed with directions to dismiss the libel.

Hutcheson, C. J., dissented (R. 84).

Statutes Involved

§9, Shipping Act of 1916, 46 U. S. Code §808.

* * *

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be

operated only under such registry or enrollment and license. *Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner*, in whole or in part, or hold any mortgage, lien, or other interest therein" (italics ours).

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§§4, 5, Suits in Admiralty Act, March 9, 1920, 46 U. S. Code §§744, 745.

"§744. *Release of privately owned vessel after seizure.* If a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this chapter. (Mar. 9, 1920, c. 95, §4, 41 Stat. 526.)

§745. *Causes of action on which suits may be brought; limitations.* Suits as herein authorized shall be brought within two years after the cause of action arises." (Mar. 9, 1920, c. 95, §5, 41 Stat. 526.)

Question presented

Does the two-year statute of limitations contained in §5 of the Suits in Admiralty Act limit the time within which suit may be brought against a privately owned vessel to recover for collision damage that occurred while such vessel was owned by the United States and employed as merchant vessel?

Reasons relied on for the allowance of the Writ.

1. The decision below is in direct conflict with the decisions of this Court as to the meaning and effect of §9 of the Shipping Act of 1916.

2. The decision below is in direct conflict with the decision in the Second Circuit on the same point, viz. *The Caddo*, 285 Fed. 643 (S. D. N. Y.).

3. The decision below is in direct conflict with the Fifth Circuit's prior decision on the same point, viz. *The Bascobal*, 295 Fed. 299 (C. C. A. 5).

4. The question presented is one of general public importance and the decision below constitutes a plain misapprehension of the purpose and effect of the Suits in Admiralty Act.

WHEREFORE petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and send to this court for its review and determination a full and complete transcript of the record below, and that the decision of said Circuit Court of Appeals be reversed and that petitioner have such other and further relief as may be just.

CLYDE MALLORY LINES
By CHAUNCEY I. CLARK
EUGENE UNDERWOOD
Counsel

Certificate

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

CHAUNCEY I. CLARK
Counsel
27 William Street,
New York City.

Dated: New York,
July 27, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

CLYDE-MALLORY LINES,
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BRIEF IN SUPPORT OF PETITION

POINT I

The decision below is in direct conflict with the law in this Court as to the meaning and effect of Section 9 of the Shipping Act of 1916.

The basis of the decision below is, as the Court said:

"* * * that the cause of action here sued upon was created by virtue of the Suits in Admiralty Act; * * *" (R. 84).

The libel is based upon a collision lien which, as this Court held in *The Lake Monroe*, 250 U. S. 246, accrues in favor of a private vessel owner when his vessel is in collision with a vessel owned by the United States employed, as was the *Eglantine*, in the merchant service. The *Lake*,

Monroe involved a collision between the privately owned *Helena* and the *Lake Monroe* owned by the United States. A libel was filed in the District Court for Massachusetts *in rem* to recover the collision damage sustained by the *Helena* and process for the seizure and attachment of the *Lake Monroe* was prayed for. The United States appeared specially, suggested that the Court was without jurisdiction to enforce a collision lien against the *Lake Monroe* and obtained in this Court an order to show cause why a writ of prohibition or mandamus should not issue to prevent the District Court for Massachusetts from directing the arrest of the *Lake Monroe* under process. This Court, after referring to Section 9 of the Shipping Act of 1916, held that by virtue of its provisions, a collision lien arises in favor of a private vessel owner against a publicly owned vessel employed in the merchant service and discharged the order to show cause saying:

"We deem it clear, also, that among the liabilities designated by the section [Section 9] is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision" (p. 256).

In *Blamberg Bros.* v. *United States*, 260 U. S. 452, this Court stated the purpose of the enactment of the Suits in Admiralty Act as follows:

"This Act was passed to avoid the embarrassment to which the Government found itself subjected by the Act of September 7, 1916, c. 451, 39 Stat. 728, by the ninth section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens. The *Lake Monroe*, 250 U. S. 246" (p. 458).

In *Eastern Transportation Company* v. *United States*, 272 U. S. 675 this Court said:

"It was this view which led us in Blamberg Bros. v. United States, 260 U. S. 452, to hold that, as the substitution by the Suits in Admiralty Act was merely to furnish a balancing consideration for the immunity of the United States from seizure of its vessels employed as merchant vessels previously permitted, *the Act did not apply in cases in which the seizure of a merchant vessel of the United States could not be prevented by the Act*, in a foreign port and court, where the immunity declared by Congress could not be given effect." (p. 686, italics ours).

Since "the Act did not apply in cases in which the seizure * * * could not be prevented * * * " it does not apply here because here the seizure could not be prevented. It was not prevented. The *Eglantine* was actually seized under process and this was properly done because she was privately owned (R. 10).

Below, respondent contended that §9 of the Shipping Act of 1916 was repealed by the Suits in Admiralty Act. However, that section appears to this day in the United States Code as §808 of Title 46. If it was repealed by the Suits in Admiralty Act, its repeal was inadvertent and quickly cured, for in §18 of the Act of June 5, 1920, c. 250, 1920, 41 Stat. 994, less than three months after the enactment of the Suits in Admiralty Act, the Congress reenacted §9 of the Shipping Act of 1916, amending it somewhat but in no particular that bears upon the language construed by this Court in *The Lake Monroe, supra*, as giving rise to a maritime collision lien.

POINT I.

The decision below is in direct conflict with the decision in the Second Circuit on the same point, viz., *The Caddo*, 285 Fed. 643.

The Caddo, 285 Fed. 643, (S. D. N. Y.) involved precisely the same point as that presented here and holds that the time limitation contained in §5 of the Suits in Admiralty Act does not apply to a suit upon a collision lien that accrued while the vessel was publicly owned and employed in the merchant service. The tug *Retriever* (renamed *M. Moran*), while owned by the United States and employed as a merchant vessel, collided with a privately owned barge, the *Caddo*, on February 12, 1920. The owner of the *Caddo* libelled the *Retriever in rem* on June 22, 1921, she having been sold in the meantime by the United States to a private owner. The United States intervened and contended that the suit, having been begun more than one year after the cause of action arose, was filed too late—the applicable statute of limitations was one year instead of two years in respect of causes of action accruing prior to the enactment of the Suits in Admiralty Act.

The Court held that because of the provision made by §4 of the Suits in Admiralty Act, Title 46, U. S. Code §744, *supra*, p. 4, for precisely the kind of suit there, and here, presented, the statute of limitations contained in §5 of the Suits in Admiralty Act is not applicable to a suit brought *in rem* against a privately owned vessel upon a collision lien accruing while such vessel was owned by the United States and employed in the merchant service. The decision below cannot be reconciled with the decision in *The Caddo*.

In *The Caddo* the Government likewise contended that §9 of the Shipping Act of 1916 had been repealed by the Suits in Admiralty Act. The Court held that it had not been repealed.

POINT III

The decision below is in direct conflict with the Fifth Circuit's prior decision on the same point, viz., *The Bascobal* 295 Fed. 299.

The Bascobal, 295 Fed. 299 (C. C. A. 5) involved precisely the same point as that presented here and holds that the time limitation contained in §5 of the Suits in Admiralty Act does not apply to a suit upon a lien that accrued while the vessel was publicly owned and employed in the merchant service. Coal laden on barge *Richmond* was lost due to the negligence of tug *Bascobal* which had the *Richmond* in tow on January 5, 1920. At that time the *Bascobal* was owned by the United States and operated as a merchant vessel. She was subsequently sold to a private owner and the libel was filed against her on March 22, 1922, more than one year after the cause of action accrued and after the expiration of the one year Statute of Limitations provided by §5 of the Suits in Admiralty Act with reference to causes of action accruing before the enactment of that Act. The Government contended that the one year limitation in section 5 applied. The Circuit Court of Appeals for the Fifth Circuit, relying upon §9 of the Shipping Act of 1916 and the decision of this Court in *The Lake Monroe*, *supra*, 250 U. S. 246, held that a lien accrued against the *Bascobal* when libellant's coal was lost and that its accrual was not prevented by Government owner-

ship of the *Bascobal*. The Court further held that because of the provisions in §4 of the Suits in Admiralty Act for suits against privately owned vessels on causes of action arising during public ownership, the Statute of Limitations contained in §5 of the Suits in Admiralty Act was not applicable.

The decision below and the decision of the same Court in *The Bascobal* cannot be reconciled.

In the case at bar Hutcheson, C. J., dissented on the ground that "The *Bascobal* case was well decided" (R. 84).

POINT IV

The question presented is one of general public importance and the decision below constitutes a plain misapprehension of the purpose and effect of the Suits in Admiralty Act.

§9 of the Shipping Act of 1916 and the Suits in Admiralty Act grew out of the great increase in Government ownership of vessels incident to the last war. During Government ownership and operation many claims arose. The Suits in Admiralty Act was enacted to facilitate suit on such claims without the coincident delay resulting from the attachment of vessels under process and the formality of the Government's giving a release bond. Following the termination of the war a great many Government owned vessels were sold to private interests. Congress recognized that these vessels might and would be sued *in rem* on the basis of liens created by virtue of §9 of the Shipping Act of 1916 and made special provision for such suits in §4 of the Suits in Admiralty Act.

Now, in another war, Government ownership of vessels is increasing rapidly. The operation of these vessels will

give rise to many claims. Many of these vessels will doubtless be sold to private interests following the termination of hostilities and claims will be asserted against them *in rem* in respect of causes of action accruing during Government ownership and operation. The volume of litigation under the Suits in Admiralty Act following the last war is not likely to afford a minimum criterion of the volume of litigation likely to ensue following the current war. The rights of claimants *in rem* against vessels sold to private owners before the assertion of claims is therefore patently a matter of general public importance from which it follows that the question raised by the two different decisions of the Circuit Court of Appeals for the Fifth Circuit and by the conflict between the latter decision of that Court (in the case at bar) and the decision in the Second Circuit should be resolved by this Court.

The purpose of the Suits in Admiralty Act, as stated by this Court in *Blamberg Brothers v. United States*, *supra*, 260 U. S. 452, 458 was to avoid the embarrassment to which the Government found itself subjected by the attachment of vessels owned by it and in its service. This purpose was altogether unrelated to whether or not the same vessel might be seized under process after the Government had sold it to a private owner and ceased to operate it. A seizure at such time could not delay or embarrass the Government. Basically, therefore, there was no need to make the Statute of Limitations contained in §5 of the Suits in Admiralty Act applicable to suits brought after sale to private owners and Congress, by clear and certain terms, provided that §5 should not apply to such cases.

The first four words of §5 are "suits as herein authorized" and it is to such suits only that the statute of limi-

tation is made applicable. The Suits in Admiralty Act did not authorize such a suit as the one at bar, viz. one against a privately owned vessel *in rem*. That act authorized *suits against the United States in personam*. This is not such a suit but was begun as a simple suit *in rem* against the privately owned vessel (Libel, R. 4-8). The United States came into this suit by voluntary intervention (R. 11-12).

The Act itself contains, almost by definition, proof that this is not a suit "authorized" by the Suits in Admiralty Act. §8 of the Act, Title 46 U. S. Code §748 provides:

"Any final judgment rendered in any suit herein authorized, *and any final judgment within the purview of §§744* * * * shall * * * be paid by the proper accounting officers of the United States * * *." (italics ours.).

This section provides for the payment of judgments in the various classes of cases to which the Act refers. One class is "any suit herein authorized". Another class is "any final judgment within the purview of §744 * * *," i.e. §4 of the Act. If a suit to which §4 of the Act applies were a "suit herein authorized" there would be no necessity for referring to it separately in §8. Congress, therefore, plainly had in mind that a judgment obtained in the kind of suit to which §744, §4 of the Act, applies is not a "suit herein authorized". In its first decision on the point, *The Bascobal, supra*, the Circuit Court of Appeals for the Fifth Circuit so held, and the District Court for Southern New York so held in *The Caddo, supra*.

§4 of the Suits in Admiralty Act expressly makes provision for suits such as the one at bar and it does not contain any time limitation with reference to such suits, i. e. Congress was presumably content to allow the general

admiralty principle of laches to apply. §4, *supra* p. 4, provides that where a privately owned vessel is attached upon a cause of action arising during prior Government ownership the vessel shall be released without bond upon the suggestion of the Government's interest by the United States attorney. The very fact that provision is expressly made for this category of suit, coupled with the fact that Congress limited the application of §5 to suits against the United States *in personam*, i. e. "suits as herein authorized," establishes the patent misconception of the Court below as to the meaning of the Suits in Admiralty Act, the error of its decision in this case and the rectitude of the earlier decisions in *The Bascobal, supra,* and *The Caddo, supra.*

The decisions of this Court relied upon below by the respondent for the purpose of establishing that the law had changed subsequent to the decisions in *The Bascobal, supra,* and *The Caddo, supra,* do not in any way relate to the point at issue.

The Western Maid, 257 U. S. 419 dealt with three collisions. The Government vessel in each one was in the *public* as distinguished from the *merchant* service. This court held that no lien accrued but this court was careful to point out (pp. 431-2) that these were *public* not *merchant* vessels. It was upon this basis alone that this court held that there was no lien. We do not here dispute the propriety of the decision in *The Western Maid.* It has no application here, however, because the vessel here involved, as in *The Bascobal, supra,* and *The Caddo, supra,* was in the *merchant* service, and in respect of such vessels liens arise under the terms of §9 of the Shipping Act of 1916, which is not applicable to public vessels.

Respondent contended below that the Suits in Admiralty Act affords the exclusive remedy upon maritime claims against the United States. We do not here contest that assertion provided it be correctly understood. In *United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Brothers & Co.*, 276 U. S. 202, relied upon below by respondent, admiralty suits had been brought against the Emergency Fleet Corporation. Of the question presented for decision this court said:

"And the question here presented as to the effect of the [Suits in Admiralty] Act is whether, as the Fleet Corporation contends, the remedy given against it by a libel *in personam* in admiralty under the provisions of the Act, is exclusive; or whether, as the libelants contend, this remedy is not exclusive and the Fleet Corporation may also, as a private corporation, be sued in admiralty by a libel *in personam*, independently of the provisions of the Act" (p. 212).

All that this Court decided was that suits against the Emergency Fleet Corporation can be brought only under the Suits in Admiralty Act. This Court indicated precisely what its decision was and took care that its decision could not fairly be enlarged, saying:

"It follows that after the passage of the Act no libel in admiralty could be maintained *against the United States or the corporations* on such causes of action except in accordance with its provisions; and that as the libels in these cases were not brought against the Fleet Corporation within the period prescribed by §5 they were barred" (p. 214; italics ours).

Johnson v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320 involved four suits. The Johnson case was an action at law brought against the Emergency Fleet Corporation in the courts of New York

State to recover damages for personal injuries. The Lustgarten case was an action at law brought against the Fleet Corporation in the District Court for Southern New York to recover for personal injuries. The Royal Insurance Company cases were actions at law against the Emergency Fleet Corporation in the courts of New York State to recover for damage to cargo. The Federal Sugar Refining Co. case was a suit under the Tucker Act. Obviously none of these cases presented any questions relating to the suit at bar. Neither the United States nor the Fleet Corporation is sued here, nor is this either an action at law or a suit under the Tucker Act.

We do not deny that one who has a maritime claim against the United States must sue the United States in the manner and within the time provided for under the Suits in Admiralty Act. This, however, is not such a suit. Petitioner asserts a maritime lien against a privately owned vessel, viz. the *Eglantine*, and relies upon the unrepealed provisions of §9 of the Shipping Act of 1916 for the existence of its lien. It has no claim, and has asserted no claim, against the United States. The Attorney General, as permitted by §4 of the Suits in Admiralty Act, has intervened in a suit not brought against the United States and has sought to apply to such a suit the time limitation provided by §5 of the Suits in Admiralty Act in respect of suits against the United States, i. e. "suits as herein authorized".

Respondent's position is wholly unmindful of the facts and justice of the case. The merits of the collision were litigated to a conclusion between petitioner and respondent with the result that the vessels were held both to blame.

As petitioner's damages exceeded respondent's damages it is, upon familiar admiralty principles, encumbent upon the *Eglantine* to pay to the *Brazos*, petitioner's vessel, half the difference between their damages to the end that the monetary loss shall be borne equally. Respondent has sought, unsuccessfully in the District Court, successfully in the Circuit Court of Appeals by a two to one decision, to escape payment of this just debt to the *Brazos*.

LAST POINT

It is respectfully submitted that a writ of certiorari should be granted, that the decision of the Circuit Court of Appeals should be reversed and that the decree of the District Court should be reinstated.

CHAUNCEY I. CLARK
EUGENE UNDERWOOD
Counsel for Petitioner

Dated: New York,
July 27, 1942.